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No. 01-1652

In the Supreme Court of the United States

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN, and PATRICK A. STEFFES,

Petitioners,

v.

SBC COMMUNICATIONS INC. and AMERITECH CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' antitrust challenge to the merger of SBC and Ameritech was properly dismissed based on the express exemption in Section 7 of the Clayton Act for line extension mergers between common carriers that do not substantially compete.

RULE 29.6 STATEMENT

SBC Communications Inc. has no parent corporation, and no publicly held company owns more than 10% of its stock. Ameritech Corporation is wholly owned by SBC Communications Inc.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek to rescind the merger of SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18. The SBC-Ameritech merger was reviewed by the Antitrust Division of the Department of Justice ("DOJ") and approved after lengthy proceedings by the Federal Communications Commission ("FCC") and two state regulatory commissions. The court below affirmed dismissal of petitioners' complaint, holding it barred by an express exemption in Section 7 for mergers that extend the lines of a common carrier where "there is no substantial competition" between the firms at the time of the merger.

The Section 7 exemption provides:

> Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from * * * extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

15 U.S.C. § 18. The decision below was compelled by that statutory language. It is uncontested that through the merger SBC extended its lines into what previously was Ameritech's territory, that there was "no substantial competition" between SBC and Ameritech at the time of the merger, and that both were common carriers subject to federal laws regulating

commerce. Petitioners have offered no valid reason why this express exemption does not bar their suit.

There is no conflict in the courts concerning the application of the Section 7 common carrier exemption to phone company mergers, which petitioners concede is an issue of first impression. Pet. 3. In fact, there is only one prior decision addressing the exemption at all, and it was issued by the same court of appeals and reached the same conclusion. See *Navajo Terminals, Inc.* v. *United States*, 620 F.2d 594 (7th Cir. 1979) (upholding merger of trucking companies).

Nor does the Seventh Circuit's ruling raise exceptional practical problems warranting intervention by this Court. Line extension mergers between noncompeting common carriers generate antitrust disputes only rarely. That explains the paucity of case law addressing the 90-year old common carrier exemption.

The proposed merger in this case underwent a government review process—by the DOJ, the FCC, and two state commissions—of unprecedented thoroughness. The agencies added numerous merger conditions and requirements addressing the complex competitive issues that characterize today's rapidly changing telecommunications marketplace. Those conditions require affirmative assistance to new market entrants, establish elaborate reporting and auditing procedures, are backed by tough sanctions, and ensure continuous monitoring by the FCC and state regulators.

The DOJ concluded that the merger, once overlapping cellular assets were spun off, did not threaten competition. The FCC ruled that the merger as conditioned would

affirmatively promote competition both in the Ameritech region and nationwide. The state commissions agreed that the merger as conditioned would jump-start competition. As for petitioners' theory that the merger prevented potential competition by SBC in Chicago, the FCC found that prior to the merger SBC had "no existing plans" to provide local telephone service in the Chicago market.

Furthermore, several alternative grounds for dismissing petitioners' complaint make this case a poor vehicle for addressing the court of appeals' application of Section 7's common carrier exemption. Petitioners' Section 7 claim relied on an "actual potential competition" theory that this Court has never adopted. Even if that theory were valid, the complaint did not allege its elements. Moreover, petitioners' complaint was an impermissible collateral attack on the FCC's approval of the SBC-Ameritech merger. Petitioners actively participated in the FCC merger proceeding and then failed to appeal the FCC's approval of the merger and its determination that the merger would affirmatively promote competition.

STATEMENT OF THE CASE

SBC and Ameritech announced their plans to merge in May 1998. At that time, SBC provided local telephone service to customers in the Southwest (Arkansas, Kansas, Missouri, Oklahoma, and Texas), the Far West (California and Nevada), and Connecticut, and Ameritech did the same for customers in the Upper Midwest (Illinois, Indiana, Michigan, Ohio, and Wisconsin).

Agency Approvals. The proposed merger was exhaustively reviewed by the Antitrust Division of the DOJ, the FCC, the Illinois Commerce Commission ("ICC"), and

the Ohio Public Utilities Commission ("PUCO"), each of which analyzed the competitive impact of the merger.

The DOJ, exercising its authority under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, declined to challenge the merger once the parties agreed to divest overlapping cellular operations in St. Louis and parts of Illinois. The DOJ explained that "there is no reason under the antitrust laws to proceed with further litigation if the divestitures of the cellular system assets are carried out in the manner required by the proposed Final Judgment." *United States* v. *SBC Communications Inc.*, 1999 WL 1211458, at *27 (D.D.C. Aug. 2, 1999). The district court approved a consent decree terminating the DOJ's investigation and dismissing its complaint. *Id.* at *11. No appeal was taken from that decision. Ameritech subsequently divested its overlapping cellular assets.

The FCC then reviewed the merger under the statutory public interest test. *Ameritech Corp.*, FCC 99-279, ¶¶ 39-45, 1999 WL 1337659 (Oct. 8, 1999) ("FCC Order"). The FCC's public interest test employs a more stringent standard than the Clayton Act. Unlike an antitrust court, which considers only whether acquisitions "substantially lessen competition" (15 U.S.C. § 18), the FCC will not approve a merger unless "it will enhance competition." FCC Order ¶¶ 49-50. The FCC proceedings lasted 14 months, involved participation by some 60 parties (including antitrust enforcement officials, telephone industry regulators, economists, and public interest advocates), and produced a voluminous record. See FCC Order ¶¶ 39-45.

The FCC imposed unprecedented and far-reaching conditions on the merging parties in a 244-page order and

213-page appendix. The FCC found that, after the merger, "competition in the provision of local exchange services, including advanced services, will increase both inside and outside the merged firm's region" (FCC Order ¶ 4); the conditions will "reduc[e] the risk and costs associated with entry into SBC and Ameritech territories, particularly with respect to residential and advanced services markets, [and] stimulate entry into these markets" (*id.* ¶ 422); and the conditions "will prove beneficial in jumpstarting residential competition by lowering entry barriers for residential competition [and will] greatly reduce the costs of entry over the long run" (*id.* ¶ 440). The FCC ultimately concluded, based on the "voluminous record," that with these conditions the SBC-Ameritech merger would promote competition and satisfy the public interest test. *Id.* ¶¶ 4, 581.

Petitioners actively participated in the FCC proceedings, offering the very same arguments they made in the courts below and demanding precisely the same relief (an order invalidating the merger). See Public Comment on behalf of South Austin Community Coalition Council, Walter Ryan Jr., Theodore Chabraja, Anita B. Hull and Robert Rifkin (received October 19, 1998) (C.A. Supp. App. Tab 1). Petitioners did not seek rehearing of the FCC's ruling (authorized by 47 U.S.C. § 405(a)), nor did they seek judicial review in a federal court of appeals (authorized by *id.* § 402(b)).[1]

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[1] An appeal of the FCC Order was filed by the Association of Communications Enterprises. It involved only a narrow issue concerning the merged company's provision through a subsidiary of certain advanced telecommunications services for resale. See *Association of Communications Enters.* v. *FCC*, 235 F.3d 662 (D.C.

The state commissions also approved the merger after extensive public hearings and imposed additional pro-competitive conditions of their own, designed to assist local exchange rivals through deep discounts and guaranteed access to Ameritech's network. See *SBC Communications Inc.*, No. 98-0555, at 108-09, 1999 WL 1331303 (ICC Sept. 23, 1999) ("ICC Order") ("the proposed merger is not likely to have a significant adverse affect on competition"; the merger conditions "represent substantial pro-competitive benefits for CLECs and end-users in Illinois"); *SBC Communications Inc.*, No. 98-1082-TP-AMT, at 40, 1999 WL 397741, at *28 (PUCO April 8, 1999) ("PUCO Order") (the merger, as conditioned, "will promote the state's telecommunications policy, competition, diversity, and customer choice").

The merger closed in October 1999. As a result, SBC's network of customers in the Southwest, Far West, and Connecticut expanded to include approximately 20 million additional customers in the Upper Midwest. The FCC and state public utility commissions continue to regulate the post-merger telephone services of SBC throughout its 13-state region.

Petitioners' Claims. Petitioners' complaint was filed on behalf of a class of all local phone service customers of SBC and Ameritech in the area served by the merged company. Cmplt. ¶¶ 3-9. Petitioners alleged a violation of Section 7 of the Clayton Act on the theory that the merger would "lessen potential competition in the relevant markets." *Id.* p. 2.

Cir. 2001), on remand, *Ameritech Corp.*, FCC 01-82, 2001 WL 830658 (Mar. 7, 2001).

The Complaint acknowledged that SBC and Ameritech were not actual competitors at the time of the merger. Cmplt. ¶¶ 10-11. Instead, the merger allegedly put an end to potential competition between the two firms in the Chicago and St. Louis markets. *Id.* ¶¶ 36, 59. The Complaint did not allege, however, when such potential competition might have occurred. And it did not mention the FCC's conclusion that SBC "had no existing plans to enter out-of-region territories at the time of the merger" (FCC Order ¶ 83) or the ICC's conclusion that there was no "reasonable probability" that SBC would provide local telephone service in Illinois "in the next two years" (ICC Order at 104). The Complaint also did not allege that any lost potential competition would have brought greater competitive benefits to consumers than were achieved through the merger conditions imposed by the DOJ, the FCC, and the state commissions.

Petitioners requested injunctive relief, specifically "divestiture of a substantial number of markets to competitors" or "an injunction unwinding the merger." Cmplt. p. 20.

Decisions Below. Explaining that petitioners' "speculative and vague claims" failed to plead an antitrust violation, the district court dismissed their complaint for lack of standing. Pet. App. 39a. The court of appeals, in a unanimous opinion authored by Judge Easterbrook and joined by Judges Kanne and Evans, affirmed on an alternative ground. Specifically, the court found controlling the fourth paragraph of Section 7 of the Clayton Act, which exempts line extension mergers of regulated common carriers from Section 7 when "there is no substantial competition" between the carriers. Pet. App. 5a-6a.

After noting that "SBC and Ameritech were common carriers" and that telecommunications carriers like SBC and Ameritech "are subject to many laws regulating commerce," the court of appeals observed that the enactment history of the common carrier exemption, which was amended specifically to include telephone and other non-rail common carriers, confirms that the exemption applies to telephone carrier mergers. Pet. App. 6a-7a. In response to petitioners' argument that the new era of telecommunications competition calls for a different reading of the exemption's scope, the court explained: "Even if competition among common carriers were a novelty, however, this would not affect the meaning of § 7. The world may have changed, but the statute has not. * * * [A] change in economic conditions is a challenge to *Congress*, not the courts; and if the legislature leaves exemptions alone, they must be enforced as written." Pet. App. 8a.

The court then considered whether petitioners' allegation that SBC and Ameritech were potential competitors made them substantial competitors. The court rejected that assertion, reasoning that, if potential competition were substantial competition, there would be "no work for the exemption to do" in light of Section 7's general ban on combinations that "may . . . substantially . . . lessen competition." Pet. App. 9a. As the court put it, "[t]he only function of this exemption must be to distinguish potential-competition from actual-competition cases." *Ibid.* Judge Easterbrook added that this conclusion is entirely reasonable, since "[a]ssessing the significance of potential competition is difficult for the best economists and would be nearly impossible as a subject for trial—especially when regulatory

agencies exercise so much control over how common carriers interact." *Ibid.*

Accordingly, the court unanimously held that the common carrier exemption plainly barred petitioners' Section 7 challenge to the SBC-Ameritech merger. Petitioners' request for rehearing en banc was denied without dissent. Pet. App. 42a-43a.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit's Unanimous Decision Does Not Conflict With Any Decision Of This Court Or Any Other Court.

As petitioners concede, the present case is one of first impression. Pet. 3. No court has previously considered the applicability of the common carrier exemption to a telephone company merger. In fact, in the nine decades since the exemption's enactment, only one case—a Seventh Circuit decision involving a merger of motor carriers, *Navajo Terminals, Inc.* v. *United States*, 620 F.2d 594 (7th Cir. 1979)—has addressed the applicability of the exemption in *any* context. And the decision below is entirely consistent with that lone precedent.

In *Navajo Terminals*, the Seventh Circuit vacated an Interstate Commerce Commission ruling that a trucking firm's acquisition of a 26 percent interest in another trucking firm violated Section 7. The court ruled that, although the two firms operated over four common routes, the carriers each served a large territory not served by the other, so that combining the two merely extended the acquiring company's lines "even though the resulting common control can substantially lessen competition in some specific markets

where both are doing business." 620 F.2d at 600-601. This is an even stronger case for application of the common carrier exemption than *Navajo Terminals* because SBC and Ameritech did not compete *at all* in the provision of local telephone service at the time of the merger.

Petitioners' attempt to manufacture a conflict with this Court's opinion in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979), and with Justice Scalia's concurring opinion in *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989), is frivolous. Neither of those opinions makes any mention of the common carrier exemption in Section 7.

Royal Drug, which petitioners cite for the proposition that "general laws like the Clayton Act" must be read broadly and "special interest exemptions" must be read narrowly (Pet. 12), was a price-fixing and group boycott case arising under the Sherman Act. This Court held only that the McCarran-Ferguson Act's antitrust exemption for the "business of insurance" does not exempt insurers' non-insurance transactions, such as price-fixing conspiracies with pharmacies. 440 U.S. at 231-233. *Royal Drug* supports the approach taken by the Seventh Circuit in this case. It reaffirms that antitrust exemptions must be evaluated in light of the "language of the statute" and its "legislative history" (*id.* at 210-211)—precisely what the Seventh Circuit evaluated here. *Royal Drug* certainly does not require or authorize courts to ignore the plain meaning of statutory antitrust exemptions and construe them more narrowly than Congress intended. See *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 781 (1993) (construing the McCarran-Ferguson Act's "business of insurance" exemption "[b]y its terms"); *National Gerimedical Hosp. & Gerontology Ctr.* v.

Blue Cross, 452 U.S. 378, 389 (1981) ("where Congress did intend to repeal the antitrust laws, that intent governs"); *United States* v. *Hutcheson*, 312 U.S. 219, 235 (1941) (antitrust exemptions "must not be read in a spirit of mutilating narrowness").

Petitioners' citation of Justice Scalia's concurring opinion in *Bock Laundry* is even farther afield. Pet. 12, 16-17. *Bock Laundry* addressed a rule of evidence, not any provision of the antitrust laws. Justice Scalia referred to interpretive rules that come into play only if the plain meaning of a statute is ambiguous or absurd. 490 U.S. at 527-529. Nothing in Justice Scalia's opinion conflicts with the decision below or the Seventh Circuit's interpretive approach. The common carrier exemption is not ambiguous, and its plain meaning does not produce absurdity. See Part II, *infra*.

Section 7's narrow common carrier exemption has been applied only twice since the passage of the Clayton Act in 1914 and only once in the context of telephone company mergers. An exemption applied so infrequently poses no threat to effective antitrust enforcement, as petitioners falsely contend. Pet. 11. The Seventh Circuit's decision in no way hinders the government's ability to address potential competition concerns arising out of mergers in the telecommunications field. The DOJ reviews all mergers in this field under the Hart-Scott-Rodino Act and is free to file complaints that raise either horizontal or vertical competition issues (as it did here). The common carrier exemption allows the FCC a full opportunity to review such mergers for potential competition concerns, with continued input from the Justice Department and an opportunity for all affected parties to seek judicial review. The demanding competition standard applied by the FCC—precluding approval unless the

merger "will enhance competition" (FCC Order ¶¶ 49-50)—is considerably more exacting than the Section 7 standard applied by antitrust courts.

Expert federal and state regulators charged with protecting consumers, including the DOJ's Antitrust Division, the FCC, and state regulatory commissions, sustained this merger after carefully reviewing its impact on local telephone service markets and imposing a host of conditions designed to affirmatively stimulate competition and protect consumers. Those agencies have been equally vigilant in sanctioning SBC/Ameritech when it has not performed to expectations, as the newspaper articles cited by petitioners demonstrate.[2]

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[2] More up-to-date materials confirm that complaints about SBC-Ameritech's service have been addressed by regulators and that local competition is increasing as expected. See *AT&T Launches New Local Service*, Chi. Trib., Jun. 6, 2002, sec. 3, at 1 (noting that AT&T has joined WorldCom-MCI, Z-Tel Technologies, and AT&T Broadband as local phone service providers in the Chicago area "seeking to steal customers from SBC Ameritech"); *The State of Phone Competition*, Chi. Trib., May 18, 2002, sec. 1, at 26 (noting that "competition in Illinois has been steadily increasing"); *Ameritech May Have Fewer Workers*, Chi. Trib., Apr. 27, 2002, sec. 3, at 1 (noting "[i]ncreasing competition and improvements in service" in Illinois). The same is true in other SBC service areas. See *SBC Communications Inc.*, FCC 01-338, 2001 WL 1456806 (Nov. 16, 2001) (granting authority to offer InterLATA (long distance) service in Arkansas and Missouri based on SBC's satisfaction of FCC competitive checklist); *SBC Communications Inc.*, FCC 01-29, 2001 WL 55637 (Jan. 22, 2001) (same for Kansas and Oklahoma); *SBC Communications Inc.*, FCC 00-238, 2000 WL 870853 (June 30, 2000) (same for Texas).

II. The Decision Below Is A Straightforward Application Of The Common Carrier Exemption.

The common carrier exemption, by its plain language, immunizes the SBC-Ameritech merger from Section 7 challenge. It states that nothing in Section 7 shall prevent a "common carrier subject to the laws to regulate commerce * * * from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired." 15 U.S.C. § 18. As the Seventh Circuit concluded, the SBC-Ameritech merger indisputably satisfies each element of the exemption.

A. The merging companies were common carriers subject to laws regulating commerce.

At the time of the merger, "[b]oth SBC and Ameritech [we]re common carriers." FCC Order ¶ 53 & n.135. See also Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 539, 544-545 (1910) (adding "telegraph, telephone, and cable companies" to the list of "common carriers" subject to ICC regulation); *Howard* v. *Illinois Cent. R.R.*, 207 U.S. 463, 497 (1908) (holding that an operator of "telephone lines" is a "common carrier"). Both companies were subject to numerous federal laws regulating commerce, including the Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934), and the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Act").

In addition, as the Seventh Circuit's opinion explains (Pet. App. 7a), the enactment history of the common carrier exemption confirms that it applies to telephone company mergers. Congress enacted the exemption based on its

understanding that line-extension mergers of regulated carriers afford potential public benefits when they do not extinguish substantial existing competition. The original House bill limited the exemption to railroads, but the Conference Committee accepted the Senate's substitution of "common carrier" for "railroad." H.R. Conf. Rep. No. 63-1168, at 13 (1914), in 3 E. Kintner, LEG. HIST. FED. ANTITRUST LAWS AND RELATED STATUTES, Part 1, at 2466 (1978). The Senate Report stated that the provision as amended would "apply to any common carrier, thus including *telephone* and pipe lines, the committee believing that all common carriers should be given the same rights in this respect and that the extension of the rights to *telephone* and pipe lines would inure to the benefit of the public." S. Rep. No. 63-698, at 47 (1914), in 2 E. Kintner, *supra*, at 1748 (1978) (emphases added). Plainly, then, SBC and Ameritech were "common carrier[s] subject to the laws to regulate commerce."

Petitioners speculate that neither the 1914 Congress that enacted the common carrier exemption nor the 1996 Congress that overhauled the telecommunications laws would have understood SBC and Ameritech to be regulated common carriers. Even if speculation about what Congress would have understood could override the plain statutory text, petitioners' argument is pure fiction.

There is no evidence in the legislative record that Congress in 1914 intended the common carrier exemption to apply only to carriers regulated in a particular manner, as petitioners contend (Pet. 12-14). And the evolution of telecommunications regulation over the last 90 years only serves to confirm the legislative rationale that led to passage of the exemption. Prior to 1914, federal common carrier

regulation was limited and state regulation sporadic (at least with respect to telephone service). R. Vietor, *AT&T and the Public Good: Regulation and Competition in Telecommunications, 1910-1987*, in FUTURE COMPETITION IN TELECOMMUNICATIONS 27, 32-40 (S. Bradley & J. Hausman eds., 1989) (describing the rise of federal regulation); W. Lavey, *The Public Policies That Changed The Telephone Industry Into Regulated Monopolies: Lessons From Around 1915*, 39 FED. COMM. L.J. 171, 184-190 (1987) (describing the rise of state regulation); see generally *Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646, 1654-1655 & n.3 (2002) (describing the early history of utility regulation).

Telephone carriers today are subject to federal and state regulation greatly surpassing that in existence in 1914. See P. Huber et al., FEDERAL TELECOMMUNICATIONS LAW §§ 3.11-3.12 (2d ed. 1999) (describing federal obligations); H. Brands & E. Leo, THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS 7-8 (1999) (describing state obligations). The 1996 Act added a host of new requirements that "impos[e] various obligations on incumbent local-exchange carriers," such as SBC and Ameritech. *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 122 S. Ct. 1753, 1756 (2002). Most relevant for present purposes, current regulation applies competitive standards to mergers that exceed Section 7 criteria, while affording affirmative assistance to new market entrants. See *supra*, p. 4; *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). Thus, rather than suggesting that the common carrier exception is somehow "obsolete," this enhancement of regulatory supervision provides compelling practical support for construing the common carrier exemption in accordance with its literal terms.

Petitioners would like this Court to judicially repeal the common carrier exemption on the ground that regulatory oversight has changed since 1914. But that is plainly an impermissible mode of statutory interpretation. "[A] statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.' Considerations of this kind are for the Congress, not the courts." *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 827 (1978) (citation omitted).

Petitioners also argue that Congress *impliedly* repealed the common carrier exemption by passing the 1996 Act (Pet. 15-16). They rely on the fact that in 1996 Congress amended Section 7 of the Clayton Act (and Section 221(a) of the Communications Act) to remove the FCC's previous general authority to immunize telecommunications mergers from all antitrust challenge. Pub. L. 104-104 § 601(b)(2)-(3), 110 Stat. at 143. But that amendment refutes petitioners' position. If Congress wanted to preclude application of the common carrier exemption to Bell company mergers, its 1996 amendment of Section 7 gave it the perfect opportunity to do so. The fact that Congress left the common carrier exemption in place shows that it continues to apply to line extension mergers of common carriers such as SBC and Ameritech that did not substantially compete at the time of the merger.

The Seventh Circuit properly rejected petitioners' argument for an implied repeal of the common carrier exemption. Repeals by implication are disfavored. *Traynor* v. *Turnage*, 485 U.S. 535, 547 (1988); *TVA* v. *Hill*, 437 U.S. 153, 189 (1978). The fact that the 1996 Act expressly states that it may not be construed to "modify, impair or supersede the applicability of any of the antitrust laws" (Pub. L. 104-

104 § 601(b)(1), 110 Stat. at 143) underscores Congress's intent to leave the common carrier exemption undisturbed.

B. SBC extended its lines through the medium of acquisition of stock and there was no competition between the merging parties.

The SBC-Ameritech merger extended SBC's "lines through the medium of acquisition of stock or otherwise" (15 U.S.C. § 18), a fact not contested by petitioners in the court below. SBC acquired Ameritech, a contiguous telephone carrier, in a transaction that enlarged SBC's local exchange network. The merger combined SBC's local network in the southwestern United States with Ameritech's local network in the Upper Midwest. See, *e.g.*, *Texas & P. Ry. Co.* v. *Gulf Ry. Co.*, 270 U.S. 266, 276-279 (1926) (Brandeis, J.) (stating traditional rule that line extension occurs when a carrier acquires facilities in a "new territory"); *Mackay Radio & Tel. Co.*, 6 F.C.C. 562, 570-577 (1938) (summarizing this Court's decisions) (a transaction creating an "extended line" occurs "when a carrier acquires by lease or otherwise the facilities of another carrier in order to extend its * * * service to an area not theretofore served by it").

Petitioners also did not dispute that neither SBC nor Ameritech provided local service in the other's region at the time of the merger. See *supra*, p. 7; ICC Order at 98 ("SBC and Ameritech do not currently compete in the relevant market"); FCC Order ¶ 65 (same). Petitioners' own complaint alleges that both SBC and Ameritech had "monopolies" in their respective local markets. Cmplt. ¶ 36. Thus, there cannot have been "substantial competition" between the merging companies.

Petitioners do argue, of course, that there was "potential" competition between SBC and Ameritech prior to the merger. Pet. 14-15. But the fact that Congress worded the common carrier exemption in the *present tense*, so that it applies "where there *is* no substantial competition," confirms that only *actual*, rather than *potential*, competition is relevant. See P. Huber et al., FEDERAL TELECOMMUNICATIONS LAW, *supra*, § 7.4.1.1 at 613 ("only actual (not potential) competition matters, and only *substantial* actual competition at that"). As the Seventh Circuit explained, "[t]he only function of [the common carrier exemption] must be to distinguish potential-competition from actual-competition cases." Pet. App. 9a. Otherwise the exemption would apply only to mergers that have little or no effect on competition (whether actual or potential) and thus could not violate Section 7 in the first place. *Ibid.* Petitioners do not even try to counter the Seventh Circuit's reasoning with any explanation of how their theory comports with the statutory text.

C. The Seventh Circuit's construction of Section 7 does not produce absurd results.

Petitioners complain that the Seventh Circuit's interpretation of the common carrier exemption will lead to absurd results, including reconsolidation of the former Bell operating companies. Pet. 17. This is idle speculation based on the hypothesis that further mergers among the former Bell operating companies would be approved by the FCC and state public utility commissions, whose authority to review, condition, and block telephone company mergers is unaffected by the Seventh Circuit's ruling. It is also possible, given the rapid growth of competition throughout the telecommunications industry fostered by the 1996 Act and

the SBC-Ameritech merger conditions imposed by the FCC and challenged by petitioners in this case, that such mergers will not fit within the category of protected line-extension mergers between regulated common carriers that do not substantially compete. This case simply does not provide an appropriate vehicle for predicting what other courts will do or be called upon to do in factually different situations that may (or may not) present themselves in future years.

Moreover, as the Seventh Circuit noted (Pet. App. 9a), having expert administrative agencies, rather than judges and juries, evaluate "potential competition" claims among regulated common carriers is a reasonable legislative choice. Assessing the significance of "potential competition" is no easy task, especially in a highly regulated industry. See R. Posner, ANTITRUST LAW 144 (2d ed. 2001) ("there is no practical method of ranking by likelihood or imminence of entry the potential competitors in a market in order to identify a set of most likely or most feared entrants. * * * And even if a set of most-likely entrants could be identified by the methods of litigation, the court would not know how to determine the significance of the elimination of one member of the set"). As commentators have explained, any detriment from a loss of potential competition is difficult to determine because "the loss of potential competition may be more than offset by the contribution of a merger to actual competition." 5 P. Areeda & D. Turner, ANTITRUST LAW ¶ 1116, at 69 (1980). The record in this case demonstrates that the expert agencies are well equipped to offset theoretical losses of potential competition by imposing requirements that stimulate *actual* competition in multiple service areas.

III. Petitioners' Complaint Is Defective For Other Reasons That Make This Case An Inappropriate Vehicle For Further Review.

This is not an appropriate vehicle for resolution of the issues raised in the petition because the complaint fails to state a valid cause of action.

A. The complaint fails to state a Section 7 claim.

Petitioners' complaint alleges a Section 7 violation based on the "actual potential competition" theory. See Cmplt. ¶¶ 58-61. By identifying SBC and Ameritech as monopolists in their respective regions, the complaint rules out an "actual competition" theory. See Cmplt. ¶ 36. And by omitting any allegations that SBC's potential entry constrained Ameritech's conduct, the complaint contains no support for a "perceived potential competition" theory. See *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 531-537 (1973); H. Hovenkamp, FEDERAL ANTITRUST POLICY 559-561 (2d ed. 1999). Petitioners are left only with their "actual potential competition" theory, which condemns a merger if the acquiring company, but for the merger, would have entered the market on its own and thereby made the market more competitive. See *United States* v. *Marine Bancorp.*, 418 U.S. 602, 625 (1974); Hovenkamp, FEDERAL ANTITRUST POLICY, *supra*, at 562-563.

This Court has never accepted the actual potential competition theory. See *Marine Bancorp.*, 418 U.S. at 639 (declining opportunity to adopt theory); *Falstaff Brewing*, 410 U.S. at 537 (same). And the courts of appeals have expressed great skepticism about the theory, noting its "novelty," its position at the "frontiers" of antitrust law, and the "understandable doubt" about its validity. *FTC* v.

Atlantic Richfield Co., 549 F.2d 289, 294 (4th Cir. 1977); *Mercantile Tex. Corp.* v. *Board of Governors*, 638 F.2d 1255, 1265 (5th Cir. 1981); *United States* v. *Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980). No court has ever granted relief to a private litigant under the theory.

This lack of support for the actual potential competition theory reflects its legal and practical defects. It does not fit with Section 7's textual limitation to mergers that "substantially lessen competition." 15 U.S.C. § 18. And it requires a largely speculative assessment of whether and when the acquiring firm would have entered the market independently, raising difficult questions of proof. See *Marine Bancorp.*, 418 U.S. at 624 ("Unequivocal proof that an acquiring firm actually would have entered de novo but for a merger is rarely available"); *Siemens Corp.*, 621 F.2d at 504 (the theory "rests on speculation about the future conduct and competitive impact of a firm currently outside the market and perhaps intending to remain so"). For these and other reasons, antitrust scholars have been highly critical of the actual potential competition theory. See Hovenkamp, FEDERAL ANTITRUST POLICY, *supra*, at 562-563 (criticizing the theory because of the difficult proof problems its raises and suggesting that it be relegated to "the scrap heap of defunct merger theories"); R. Posner, ANTITRUST LAW, *supra*, at 145 (recommending that the entire potential competition doctrine be abandoned).

Even if the actual potential competition theory could support a Section 7 claim, petitioners' complaint failed to allege the required elements. The complaint alleged that the SBC-Ameritech merger preempted plans by Ameritech to offer local phone service in St. Louis and by SBC to offer local phone service in Chicago. Cmplt. ¶¶ 59-60, 64. But

petitioners all reside in the Ameritech region (Cmplt. ¶¶ 3-8) and therefore would not have standing to challenge any loss of potential competition in St. Louis. See *Southwest Suburban Bd. of Realtors, Inc.* v. *Beverly Area Planning Ass'n*, 830 F.2d 1374, 1379 (7th Cir. 1987) (plaintiff did not have standing to bring antitrust claim where it was not a "participant in [the relevant] market"). As for SBC's potential entry into the Chicago market, the Complaint did not allege that, but for the merger, SBC would have offered local telephone service in Chicago in the near future; that AT&T, MCI-WorldCom, and Sprint were not viable entrants; or that SBC's entry was necessary to deconcentrate the Chicago market. Such allegations are preconditions to any claim based on the actual potential competition theory. *Marine Bancorp.*, 418 U.S. at 630, 633; *Tenneco, Inc.* v. *FTC*, 689 F.2d 346, 352 (2d Cir. 1982).

Petitioners' speculation about vague "plans" on the part of SBC is insufficient to state a claim. Cmplt. ¶ 59; see *Marine Bancorp.*, 418 U.S. at 622-623 (Section 7 "deals in probabilities, not ephemeral possibilities"). Allegations about a potential entrant's "plans" for entering a market must relate "to the near future" and not merely speculate about "eventual entry." *BOC Int'l Ltd.* v. *FTC*, 557 F.2d 24, 29 (2d Cir. 1977); see also *Tenneco*, 689 F.2d at 352 (rejecting an actual potential competition claim based on a failure to show that the acquiring company would have entered the relevant market "in the near future"). Moreover, petitioners have not alleged that the FCC erred in finding that SBC "had *no existing plans* to enter out-of-region territories at the time of the merger." FCC Order ¶ 83 (emphasis added).

Nor did petitioners' complaint allege that SBC's entry was needed to deconcentrate the Chicago market. A

potential competition claim must allege not only that there are "few other equivalent potential entrants," but also that entry barriers stand in the way of competition by others. 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 355 (5th ed. 2002) (citing cases). Otherwise, the loss of a particular potential competitor will have little effect on the likelihood of independent future entry. Petitioners' failure to allege the lack of other viable entrants into the Chicago market is not surprising, given the ICC's findings that "more than a few potential entrants are equivalent to SBC" (including AT&T, MCI-Worldcom, Sprint, BellSouth, Verizon, and Qwest) and that "more than 20 local exchange carriers" then provided competitive service in Ameritech Illinois' service territory. ICC Order at 97, 103. The complaint's failure to specify any entry barriers is also unsurprising, given the "host of special duties" that the 1996 Act imposes on incumbent local exchange carriers, *Goldwasser* v. *Ameritech Corp.*, 222 F.3d 390, 399-400 (7th Cir. 2000), the numerous pro-competitive merger conditions imposed by state and federal regulators, and the effect of rapidly proliferating technology on market entry. All these omissions were fatal to petitioners' actual potential competition claim.

B. Petitioners impermissibly seek to relitigate the findings of the FCC.

There is an additional fatal defect in petitioners' antitrust complaint. It amounts to an impermissible collateral attack on the FCC's approval of the SBC-Ameritech merger. Petitioners fully participated in the FCC's proceedings, where they made the same arguments that they raised in this case, but failed to take an available appeal when their arguments were rejected.

As this Court explained in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 306 (1973), regulatory proceedings subject to judicial review "obviate any necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision." Both the majority and dissenting opinions in *Ricci* agreed that "when a court stays its hand to allow agency proceedings," as it did here (see *South Austin Coalition Community Council* v. *SBC Communications Inc.*, 191 F.3d 842 (7th Cir. 1999)), "the result of those proceedings may not be collaterally attacked when the case returns to the court." 409 U.S. at 306; *id.* at 312 (Marshall, J., dissenting); accord *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970) (unanimously concluding that it would be "inappropriate" to allow the plaintiff to "force collateral redetermination of the same issue" by the district court).

This is a far stronger case than *Ricci* for rejecting an attempt to relitigate issues actually resolved by the agency. The plaintiff there lacked any right to participate in the agency proceeding at issue (409 U.S. at 312), whereas the petitioners here actively participated in the FCC proceeding. Petitioners' lengthy brief in the FCC proceeding, filed by the same counsel who represents them here, contained allegations virtually identical to those made in this case—that the merger would violate the Clayton Act by causing a loss of potential competition—and sought the very same relief. See *supra*, p. 5; *Pan Am. World Airways, Inc.* v. *United States*, 371 U.S. 296, 313 & n.19 (1963) (antitrust suit "should have been dismissed" where the "remedy in this civil antitrust suit" was "available" from the agency). The FCC expressly considered petitioners' arguments, citing them in its Order (nn.149 & 1115), and rejected them, ruling instead

that the merger would affirmatively promote competition to the benefit of consumers. FCC Order ¶¶ 4, 581.

Petitioners could have appealed the FCC's decision pursuant to 47 U.S.C. § 402(b) but elected not to do so. Instead, they demand an opportunity to relitigate the very issues already addressed and actually disposed of by the FCC. Petitioners' collateral attack is directly foreclosed by *Ricci* and its progeny. See also *In re Wheat Rail Freight Rate Antitrust Litig.*, 759 F.2d 1305, 1314 (7th Cir. 1985) (where an antitrust plaintiff previously participated in regulatory proceedings, the agency approved the conduct challenged by the plaintiff, and the plaintiff failed to appeal but sought the same remedy from the antitrust court, permitting the antitrust suit to proceed in the district court "would be repugnant to the operation of the regulatory scheme"). Petitioners' failure to appeal has substantially prejudiced SBC and Ameritech, which have expended vast resources in reliance on the FCC's approval order and in compliance with the host of conditions imposed by the FCC and the state commissions.

In light of these fundamental defects in petitioners' antitrust case, it is clear that, even if this Court granted certiorari on the question presented, petitioners' complaint would still be subject to dismissal. There is no reason to waste substantial private and judicial resources in a fruitless endeavor.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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